

United States 4
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

FANNIE UNDERWOOD LARSEN, Executrix of
the Estate of ORVILLE LARSEN, De-
ceased,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Arizona.

FILED

JUN 6 - 1920

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

JOHN C. GUNG'L, Esquire, United States Attorney for the District of Arizona, Tucson, Arizona; LEMUEL P. MATHEWS, Assistant United States Attorney for the District of Arizona, Phoenix, Arizona; J. P. GROSS, Regional Attorney United States Veterans' Bureau, Phoenix, Arizona,
Attorneys for the (Defendant) Appellant.

FRED W. FICKETT, Jr., Esquire, Tucson, Arizona; WM. R. MIZBAUGH, Esquire, Tucson, Arizona;
Attorneys for the (Plaintiff) Appellee.

[1*]

In the District Court of the United States in and
for the District of Arizona.

No. L.-423—TUCSON.

ORVILLE LARSEN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

Comes now the plaintiff, and for his cause of action against the defendant, alleges:

I.

That the plaintiff is a resident of the city of Tucson, within the State and District of Arizona.

II.

That on the 26th day of March, 1918, the plaintiff enlisted in the military service of the United States of America. That within one hundred twenty (120) days thereafter, upon the application of plaintiff, and while the plaintiff was still in the military service of the United States of America, there was issued to the plaintiff by the defendant, a policy of War Risk Insurance, numbered T-1,-717,643, and in consideration of the premiums paid and to be paid by the plaintiff under said policy, the defendant obligated itself to pay to the plaintiff, among other things, in the event of permanent and total disability, the sum of ten thousand (\$10,000.00) dollars with interest, payable in two hundred forty (240) monthly installments of fifty-seven and 50/100 (\$57.50) dollars each, commencing at the date of disability. [2]

III.

That plaintiff was honorably discharged from the military service of the United States of America on or about the 5th day of April, 1919.

IV.

That during the month of September, 1918, while the plaintiff was in the military service of the United States of America, and in line of duty of the plaintiff, and while the policy of insurance herein referred to was in full force and effect, the plaintiff was engaged in active combat in the St. Mihiel Offensive in France, during which combat plaintiff did inhale poisonous gases, and did suffer extreme physical hardships and exposure, by reason of and as the sole and direct result of which plaintiff contracted nephritis and active pulmonary tuberculosis, and that because of such nephritis and active pulmonary tuberculosis contracted as aforesaid, the plaintiff became, on or about the 5th day of April, 1919, and ever since said date has been and now is, totally and permanently disabled, and permanently incapacitated from following any active occupation or vocation in life; and unable to do anything for his support and maintenance, and said policy of insurance hereinbefore referred to was in full force and effect on and after the 5th day of April, 1919. That because of such disability caused as aforesaid, the defendant became obligated under said contract of insurance, to pay to the plaintiff the sum of ten thousand (\$10,000.00) dollars, with interest, payable in two hundred forty (240) monthly installments of fifty-seven and 50/100 (\$57.50) dollars each, from and after the 5th day of April, 1919.

V.

That plaintiff has paid all of the premiums on his

part [3] to be paid under said policy of insurance, and has performed all of the covenants and agreements by him to be performed under said policy of insurance, and that said policy of insurance is now, and ever since the issuance of said policy, has been in full force and effect.

VI.

That under and by virtue of the laws of the United States of America, it became, and now is the duty of the Director of the Veterans' Bureau to pay to the plaintiff under said contract and policy of insurance, the amount due thereon, to wit: ten thousand (\$10,000.00) dollars, with interest, in monthly installments as aforesaid, and the defendant became and now is obligated to pay to the plaintiff the full sum of ten thousand dollars (\$10,000.00), with interest, as aforesaid, yet the said defendant and the said Director of the Veterans' Bureau have hitherto refused and do now refuse to pay to said plaintiff any of the amount due on said policy and contract of insurance except the sum of four thousand four hundred and $24/100$ (\$4,400.24) dollars, which has been paid and is now being paid to the plaintiff by the defendant at the rate of twenty-five and $30/100$ (\$25.30) dollars per month. That plaintiff has made to the said Director of the Veterans' Bureau the proof required by the regulations and rules of said Veterans' Bureau to entitle plaintiff to the payment of the full amount of the aforesaid insurance. That a disagreement has arisen between

said Veterans' Bureau and the plaintiff as to the amount plaintiff is entitled to under said policy and contract of insurance, and plaintiff has demanded the payment of the full sum of ten thousand (\$10,000.00) dollars, with interest, as aforesaid, but the defendant and the [4] Veterans' Bureau have refused to pay and do now refuse to pay said full sum of ten thousand (\$10,000.00) dollars with interest, and has only paid and agreed to pay to the plaintiff the sum of four thousand four hundred and $24/100$ (\$4,400.24) dollars, as aforesaid, and there is now due and payable to the plaintiff under said contract and policy of insurance, in addition to the said four thousand four hundred and $24/100$ (\$4,400.24) dollars, which is now being paid in monthly installments, the sum of twenty-nine hundred twenty and $20/100$ (\$2920.20) dollars in cash for monthly installments past due and unpaid, also one hundred forty-nine (149) monthly installments of thirty-two and $20/100$ (\$32.20) dollars, beginning December, 1926.

WHEREFORE, plaintiff prays judgment against the defendant as follows:

1. That said defendant be ordered and directed to pay to the plaintiff the sum of twenty-nine hundred twenty and $20/100$ (\$2920.20) dollars in cash, together with interest thereon at the rate of six per cent *per annum* from the several dates when the installments became due and payable, until said sum is paid.

2. That said defendant be ordered and directed to pay to the plaintiff the sum of thirty-two and

20/100 (\$32.20) dollars on the first day of each and every month hereafter until there shall have been paid one hundred forty-nine (149) additional installments to those already paid and now being paid.

3. For such other and further relief as to the Court may seem proper.

FRED W. FICKETT, Jr.,
WM. R. MISBAUGH,
Attorneys for Plaintiff. [5]

State of Arizona,
County of Pima,—ss.

Orville Larsen, being first duly sworn, on oath deposes and says: That he is the plaintiff named in the above-entitled cause; that he has read the foregoing complaint and knows the contents thereof; that the matters therein alleged are true of his own knowledge, except those matters alleged on information and belief, and as to those he believes them to be true.

ORVILLE LARSEN.

Subscribed and sworn to before me this 24th day of November, 1926.

[Seal] FRED W. FICKETT, Jr.,
Notary Public.

My commission expires June 14, 1930.

[Indorsements]: Filed Nov. 26, 1926.

Received copy of the within complaint this 26th day of November, 1926.

JOHN B. WRIGHT,
United States Attorney.

By CLARENCE V. PERRIN,
Assistant United States Attorney. [6]

[Title of Court and Cause.]

MOTION TO STRIKE.

Comes now the defendant above named and moves that this Court strike from plaintiff's complaint all those certain parts hereof, hereinafter particularly described, on the grounds that the same constitute redundant and immaterial matter, to wit:

I.

All that part of Paragraph IV of the said complaint, beginning with the words, "that because" in the eighteenth line of said Paragraph IV and continuing to the end of said paragraph.

II.

All that part of Paragraph VI of said complaint, beginning with the first words thereof, and ending with the words, "as aforesaid," in the eighth line thereof.

III.

All that part of said Paragraph VI of said complaint, beginning with the words, "that plaintiff" in the fifteenth line, and ending with the words, "aforesaid insurance" in the eighteenth line.

IV.

All that part of said Paragraph VI of said complaint, beginning with the words, "and there is now due," in the fifth line on the fourth line, and continuing to the [7] end of the paragraph.

V.

All that part of the prayer, relating to interest, and all that part of Paragraph 2 of the said prayer, relating to future installments.

JOHN B. WRIGHT,
United States Attorney.
By GEORGE R. HILL,
Asst. United States Attorney.

[Indorsements]: Filed Feb. 10, 1927. [8]

[Title of Court and Cause.]

WAIVER OF JURY AND REQUEST FOR
SPECIAL FINDINGS.

Comes now the United States of America, defendant above named, and waives the right of trial by jury in the above-entitled cause, and consents that the same be tried by the Court without a jury, and respectfully requests that the Court make *specific* findings on each and every issue tried before the Court.

JOHN B. WRIGHT,
United States Attorney.
By GEORGE R. HILL,
Asst. United States Attorney.

Plaintiff does hereby join in and consent to the above waiver and request.

Dated at Tucson, Arizona, this 17th day of September, 1928.

FRED W. FICKETT,
Attorney for Plaintiff.

[Indorsements]: Filed Feb. 11, 1927. [9]

November, 1926, Term—Tucson.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

(Minute Entry of Friday, April 8, 1927.)

[Title of Court and Cause.]

MINUTES OF COURT—APRIL 8, 1927—
ORDER OVERRULING MOTION TO
STRIKE.

The defendant's motion to strike having been heretofore argued and submitted and the Court having duly considered the same, does now

ORDER that all grounds of said motion be and they are hereby overruled, except such grounds thereof as apply to the claim of interest and future monthly payments. Upon those matters the Court reserves its ruling until the trial of the cause. Exceptions noted on behalf of the defendant. The defendant is allowed ten days to answer. [10]

[Title of Court and Cause.]

FIRST AMENDED ANSWER.

Comes now the United States of America, defendant above named and files this its first amended answer and alleges and denies as follows, to wit:

I.

Defendant alleges that the plaintiff allowed his insurance to lapse for nonpayment of the premium due May 1, 1919, and thereafter on October 21, 1921, the plaintiff applied for a reinstatement of two thousand and no/100 (\$2,000.00) dollars of said insurance, and upon plaintiff's representation that he was not then totally and permanently disabled, the said policy was reinstated in the sum of two thousand and no/100 (\$2,000.00) dollars, and that thereafter on October 1, 1922, the plaintiff converted his said two thousand and no/100 (\$2,000.00) dollar term insurance into a twenty payment life policy, and paid premiums thereon until January, 1924. On November 5, 1923, plaintiff again applied for reinstatement of his said lapsed eight thousand and no/100 (\$8,000.00) dollar term insurance, which application was rejected for the reason that at that time plaintiff was totally and permanently disabled, and that plaintiff had failed to appeal from the order denying such reinstatement, and failed to cause the same to be reviewed, and that by reason thereof, he is now barred and estopped from claiming that such insurance was in effect. [11]

II.

And answering further defendant alleges that upon plaintiff's application for reinstatement of the said two thousand and no/100 (\$2,000.00) dollars he furnished to the director satisfactory proof showing that he was not then and there totally and permanently disabled, whereupon the director decided that the plaintiff was not totally and permanently disabled, and was entitled to reinstatement, and that such decision of the director was and is final and conclusive, and the plaintiff is barred and estopped from asserting or claiming that he was totally and permanently disabled prior to plaintiff's application for reinstatement.

III.

Defendant further alleges that plaintiff is barred and estopped from maintaining this action on the two thousand and no/100 (\$2,000.00) dollar life insurance policy, which is in effect for the reason that the said policy was a new contract which supplemented the term insurance, and took its place, and constituted a novation. It was and is a policy independent from the ten thousand and no/100 (\$10,000.00) dollar term insurance and that it is not pleaded herein.

IV.

And answering further, the defendant alleges that the plaintiff was awarded thirteen and 80/100 (\$13.80) dollars monthly on two thousand five hundred and no/100 (\$2,500.00) dollars insurance, a part of the lapsed eight thousand and no/100

(\$8,000.00) dollars insurance, which was held to be in force by virtue of compensation remaining uncollected at the time of permanent and total disability under Section 305 of the World War Veterans' Act, as amended, all of which has been known to plaintiff, and the plaintiff has never appealed or attempted to review the order allowing him the two thousand five hundred and no/100 (\$2,500.00) dollars [12] extended insurance, but has accepted the same, and is now barred and estopped from claiming that the said order and allowance for said insurance was erroneously made.

V.

The defendant further alleges that plaintiff's said disability is alleged to have accrued on or about the 5th day of April, 1919, and that this action was not filed until about the 24th day of November, 1926; that plaintiff's contract of insurance was in writing, and that it was not made or executed in the State of Arizona, and that plaintiff's cause of action thereon is barred by the provisions of Sections 713 and 716 of the Revised Statutes of the State of Arizona.

WHEREFORE, defendant prays that plaintiff's cause of action be dismissed.

JOHN B. WRIGHT,

United States Attorney.

By GEORGE R. HILL,

Asst. United States Attorney.

[Indorsements]: Received copy of the within this 17th day of October, 1927.

FRED W. FICKETT, Jr.,
Attorneys for Plaintiff.

Filed Oct. 17, 1927. [13]

[Title of Court and Cause.]

SECOND AMENDED ANSWER.

Comes now the United States of America, defendant above named and files this its second amended answer and alleges and denies as follows, to wit:

I.

Defendant alleges that the plaintiff allowed his insurance to lapse for nonpayment of the premium due May 1, 1919, and thereafter on October 21, 1921, the plaintiff applied for a reinstatement of two thousand and no/100 (\$2,000.00) dollars of said insurance, and upon plaintiff's representation that he was not then totally and permanently disabled, the said policy was reinstated in the sum of two thousand and no/100 (\$2,000.00) dollars, and that thereafter on October 1, 1922, the plaintiff converted his said two thousand and no/100 (\$2,000.00) dollars term insurance into a twenty payment life policy, and paid premiums thereon until January, 1924. On November 5, 1923, plaintiff again applied for reinstatement of his said lapsed eight thousand and no/100 (\$8,000.00) dollar term insurance, which application was rejected for the reason that at that time plaintiff was totally and permanently

disabled, and that plaintiff had failed to appeal from the order denying such reinstatement, and failed to cause the same to be reviewed, and that by reason thereof, he is now barred and estopped from claiming that such insurance was in effect. [14]

II.

And answering further defendant alleges that upon plaintiff's application for reinstatement of the said two thousand and no/100 (\$2,000.00) dollars he furnished to the director satisfactory proof showing that he was not then and there totally and permanently disabled, whereupon the director decided that the plaintiff was not totally and permanently disabled, and was entitled to reinstatement, and that such decision of the director was and is final and conclusive, and the plaintiff is barred and estopped from asserting or claiming that he was totally and permanently disabled prior to plaintiff's application for reinstatement.

III.

Defendant further alleges that plaintiff is barred and estopped from maintaining this action on the two thousand and no/100 (\$2,000.00) dollar life insurance policy, which is in effect for the reason that the said policy was a new contract which supplemented the term insurance, and took its place and constituted a novation. It was and is a policy independent from the ten thousand and no/100 (\$10,000.00) dollar term insurance and that it is not pleaded herein.

IV.

And answering further, the defendant alleges

that the plaintiff was awarded thirteen and 80/100 (\$13.80) dollars monthly on two thousand five hundred and no/100 (\$2,500.00) dollars insurance, a part of the lapsed eight thousand and no/100 (\$8,000.00) dollars insurance, which was held to be in force by virtue of compensation remaining uncollected at the time of permanent and total disability under Section 305 of the World War Veterans' Act, as amended, all of which has been known to plaintiff, and the plaintiff has never appealed or attempted to review the order allowing him the two thousand five hundred and no/100 (\$2,500.00) dollars, [15] extended insurance, but has accepted the same, and is now barred and estopped from claiming that the said order and allowance for said insurance was erroneously made.

V.

The defendant further alleges that plaintiff's said disability is alleged to have accrued on or about the 5th day of April, 1919, and that this action was not filed until about the 24th day of November, 1926; that plaintiff's contract of insurance was in writing, and that it was not made or executed in the State of Arizona, and that plaintiff's cause of action thereon is barred by the provisions of Sections 713 and 716 of the Revised Statutes of the State of Arizona.

VI.

And answering further defendant denies each and every allegation in plaintiff's complaint, not hereinabove specifically admitted.

WHEREFORE, defendant prays that plaintiff's cause of action be dismissed.

JOHN B. WRIGHT,
United States Attorney.
By GEORGE R. HILL,
Asst. United States Attorney.

[Indorsements]: Received copy of the within "second amended answer" this 29th day of October, A. D. 1927.

WM. R. MISBAUGH,
FRED W. FICKETT, Jr.,
Attorneys for Plaintiff.

Filed Nov. 9, 1927. [16]

[Title of Court and Cause.]

DEMURRER TO SECOND AMENDED ANSWER.

Comes now the above-named plaintiff and demurs specially and separately to Paragraphs II, III, IV and V, and all of Paragraph II after the words 'and thereafter' in the third line of said Paragraph II, all in defendant's second amended answer, on the ground that in each of said paragraphs defendant attempts to set up an independent defense to plaintiff's complaint, and that each one of said paragraphs of said second amended answer of the defendant, does not state facts sufficient to constitute a defense to plaintiff's complaint, and for that reason is insufficient.

WHEREFORE, plaintiff prays the Court to enter its order and decree that each one of the above named paragraphs in defendant's second amended answer, considered separately and independently, is insufficient to constitute a defense to plaintiff's complaint, and that the defendant take nothing by said defenses.

In support of this demurrer plaintiff cites the memorandums of authorities filed and cited in the Hickman case, L.-440—Tucson.

FRED W. FICKETT, Jr.,
WM. R. MISBAUGH,
Attorneys for Plaintiff.

Copy received this 21st day of November, 1927.

CLARENCE V. PERRIN,
Asst. U. S. Atty.

[Indorsements]: Filed Nov. 21, 1927. [17]

May, 1928, Term—Tucson.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

(Minute Entry of Monday, September 17, 1928.)

[Title of Court and Cause.]

MINUTES OF COURT—SEPTEMBER 17, 1928
—ORDER OVERRULING DEMURRER.

Plaintiff's demurrer to second amended answer comes on regularly for hearing this date; F. W.

Fickett, Esquire, and W. R. Mizbaugh, Esquire, appear as counsel for the plaintiff; B. E. Marks, Esquire, Assistant United States Attorney, appears as counsel for the United States, and on his motion, L. A. Lawler, Esquire, and J. P. Grosse, Esquire, counsel for the Veterans' Bureau, are entered and appear as associate counsel for the Government.

WHEREUPON, the defendant withdraws the defense of statute of limitations as alleged in Paragraph V of the answer, and it is thereupon ORDERED that said demurrer be and it is overruled.

[18]

[Title of Court and Cause.]

STIPULATION RE SUBSTITUTION OF
PLAINTIFF.

Orville Larsen, the plaintiff in the above-entitled cause, having died on or about the 29th day of March, 1928, and his wife, Fannie Underwood Larsen, having been appointed executrix of the estate of Orville Larsen, deceased, by the Superior Court Court of the State of Arizona, in and for the county of Pima, on the 22d day of May, 1928. IT IS HEREBY STIPULATED that the said Fannie Underwood Larsen, executrix of the estate of

Orville Larsen, deceased, be substituted as plaintiff in said above-entitled action.

JOHN B. WRIGHT,
U. S. Attorney.

By B. E. MARKS,
Assistant.

FRED. W. FICKETT,
WM. R. MISBAUGH,
Attorneys for Plaintiff.

[Indorsements]: Filed Sep. 25, 1928. [19]

May, 1928, Term—Tucson.

Honorable WILLIAM H. SAWTELLE, United States District Judge, Presiding.

(Minute Entry of Tuesday, September 25, 1928.)

[Title of Court and Cause.]

MINUTES OF COURT—SEPTEMBER 25, 1928
—ORDER ALLOWING SUBSTITUTION
OF PLAINTIFF.

Upon reading the stipulation filed by the attorneys for the respective parties hereto,

IT IS HEREBY ORDERED that Fannie Underwood Larsen, executrix of the estate of Orville Larsen, deceased, be and she is hereby substituted as plaintiff in the above-entitled action. [20]

[Title of Court and Cause.]

DEFENDANTS' SECOND AMENDED ANSWER.

Comes now the United States of America, defendants above named and file this their second amended answer to plaintiff's amended complaint and allege and deny as follows:

I.

Defendants allege that Orville Larsen, the decedent above named allowed his war risk insurance to lapse for the nonpayment of the premium due May 1, 1919, and thereafter on October 21, 1921 applied for reinstatement of two thousand and no/100 (\$2,000.00) dollars of said insurance, representing in such application for reinstatement that he was not then totally and permanently disabled, and the defendants relying upon such representation and under the assumption that plaintiff was not totally and permanently disabled, reinstated two thousand and no/100 (\$2,000.00) dollars of insurance of decedent's lapsed ten thousand and no/100 (\$10,000.00) dollars term insurance and thereafter accepted from the decedent the monthly premiums becoming due under the terms of said reinstated two thousand and no/100 (\$2,000.00) dollars insurance until October 1, 1922. And that by reason of such reinstated insurance, plaintiff was from October 21, 1921, until October 1, 1922, indemnified and protected against permanent and total disability or death occurring between said dates by virtue [21]

of said two thousand and no/100 (\$2,000.00) dollars reinstated term insurance. That by reason of such representations made by the decedent and by reason of the actions taken thereunder by the United States Veterans' Bureau as the agent of defendants herein, both in issuing and protecting plaintiff by insurance against permanent and total disability or death occurring after October 21, 1921, plaintiff is barred and estopped from asserting or claiming that decedent was permanently and totally disabled prior to October 21, 1921.

II.

And answering further, defendants allege that on October 1, 1922, decedent applied for a conversion of said two thousand and no/100 (\$2,000.00) dollars reinstated term insurance to a twenty payment life policy representing in connection with the said application for conversion of said insurance that he was not then permanently and totally disabled, and the United States Veterans' Bureau relying upon such representation and under the assumption that plaintiff was not then permanently and totally disabled converted his said two thousand and no/100 (\$2,000.00) dollars term insurance to twenty payment life policy, issued a policy thereon, accepted payment of premiums from the decedent, indemnified him against permanent and total disability or death occurring from and after October 1, 1922, and paid plaintiff the monthly benefits becoming due under said policy of insurance under a finding that decedent become totally and permanently disabled October 31, 1923, which said benefits decedent

accepted until his death on March 29, 1928; that by reason of such representation relied and acted upon by both the decedent and the United States Veterans' Bureau, plaintiff is now barred and [22] estopped from asserting that decedent was permanently and totally disabled at any time prior to October 1, 1922.

III.

And answering further defendants allege that upon decedent's application for reinstatement and conversion of insurance as aforesaid, and in connection therewith, decedent was required and did submit proof to the director of the United States Veterans' Bureau, showing that he was not permanently and totally disabled as required by Section 408 of the War Risk Insurance Act, whereupon the director of the United States Veterans' Bureau, after considering such evidence as submitted by the decedent, decided that decedent was not permanently and totally disabled and was entitled to reinstate his insurance, and that such decision of the director was and is final and conclusive and is *res adjudicata* both as to the decedent and those claiming through or under him.

IV.

And answering further defendants allege that the two thousand and no/100 (\$2,000.00) dollars reinstated insurance issued upon the decedent's application dated October 21, 1921, was a new contract which superseded the ten thousand and no/100 (\$10,000.00) dollars term insurance contract and took its place and constituted a novation, and that there-

after any and all rights which decedent may have had under his former contract of ten thousand and no/100 (\$10,000.00) dollars contract of insurance were merged in his two thousand and no/100 (\$2,000.00) dollars contract of reinstated term insurance.

V.

And answering further defendants allege that the two thousand and no/100 (\$2,000.00) dollars twenty payment [23] life policy issued upon the decedent's application dated October 1, 1922, for conversion of his two thousand and no/100 (\$2,000.00) dollars reinstated term policy was a new contract and took the place of the two thousand and no/100 (\$2,000.00) dollars reinstated contract of insurance and constituted a novation, and said former two thousand and no/100 (\$2,000.00) dollars reinstated term insurance became null and void.

VI.

Answering further said complaint, defendants admit the allegations in Paragraph I, II, and III thereof.

VII.

Defendants deny each and every allegation in Paragraphs IV and V of said complaint as though said allegations were here specifically repeated.

VIII.

Defendants deny each and every allegation in Paragraph VI contained except that it is admitted that a disagreement existed between the decedent and the United States Veterans' Bureau as alleged

in said Paragraph VI and it is further admitted that the United States Veterans' Bureau has paid the monthly benefits on decedent's two thousand and no/100 (\$2,000.00) dollars converted insurance from October 31, 1923, and has also paid the monthly installments accruing from October 31, 1923, until January, 1927, on two thousand four hundred and 32/100 (\$2,400.32) dollars insurance which was erroneously deemed to be in force under the provisions of Section 305 of the World War Veterans' Act.

IX.

Defendants deny each and every allegation of plaintiff's complaint not hereinabove specifically admitted. [24]

WHEREFORE, defendants pray that plaintiff take nothing by her action, and for costs.

JOHN B. WRIGHT,
United States Attorney,
By B. E. MARKS,
Asst. United States Attorney.

[Indorsements]: Received copy of the within this 27th day of September, A. D. 1928.

WM. R. MISBAUGH,
FRED W. FICKETT,
Attorneys for Plaintiff.

Filed Sep. 27, 1928. [25]

[Title of Court and Cause.]

THIRD AMENDED ANSWER, COUNTER-CLAIM AND OFFSET.

Come now the United States of America, defendants in the above-entitled cause, by their United States Attorneys, and file this, their third amended answer, counterclaim and offset to plaintiff's complaint, and alleges and denies, as follows, to wit:

I.

The defendants admit that they granted to Orville Larsen, a contract of war risk term insurance in the principal sum of ten thousand dollars, payable as prescribed by its terms to the designated beneficiary thereof in the event the said Orville Larsen died while said contract was in force and effect and payable to him in installments of fifty-seven and 50/100 dollars per month in the event he became permanently and totally disabled while said contract was in force, so long as he remained so disabled.

II.

The allegations contained in Paragraphs I and II of the plaintiff's complaint are denied, except as hereinabove admitted.

III.

The allegations contained in Paragraph III of the plaintiff's complaint are admitted.

IV.

The allegations contained in the fourth and fifth

Paragraphs of the plaintiff's complaint are denied.
[26]

V.

Answering paragraph VI of plaintiff's complaint it is denied that under and by virtue of the laws of the United States of America, it became, and now is the duty of the director of the Veterans' Bureau to pay to the plaintiff under said contract and policy of insurance, the amount due thereon, to wit: Ten thousand dollars, with interest, in monthly installments as aforesaid, and the defendants became and now are obligated to pay to the plaintiff the full sum of ten thousand dollars, with interest, as aforesaid.

Further answering said Paragraph VI it is admitted that the defendants and the director of the United States Veterans' Bureau have refused and do now refuse to pay plaintiff any amounts provided for or any proceeds of the said ten thousand dollars war risk term insurance contract granted the said Orville Larsen by defendants.

Further answering said paragraph it is denied that the defendants have paid plaintiff or the said Orville Larsen the sum of four thousand four hundred and $24/100$ dollars, by reason of or as proceeds of said ten thousand dollar War Risk Term Insurance contract granted the said Orville Larsen and denies that said sum has been paid or is now being paid to the plaintiff by the defendants at the rate of twenty-five and $30/100$ dollars per month, or otherwise.

Further answering said paragraph it is admitted

that a disagreement has arisen between the United States Veterans' Bureau and the plaintiff as to the amount the plaintiff is entitled to under said war risk term insurance contract and that plaintiff has demanded the payment of the full sum of ten thousand dollars, with interest. The defendants and the United States Veterans' Bureau have refused to pay and do now refuse to pay the full sum of ten thousand dollars to the plaintiff. The remaining allegations in said paragraph contained are denied. [27]

VI.

Further answering plaintiff's complaint and as an affirmative defense, defendants aver and allege that on or about the first day of October, A. D. 1922, the said Orville Larsen surrendered and abandoned any and all rights he had under and by virtue of the said ten thousand dollars war risk term insurance contract and converted the same into a twenty payment Government life insurance policy for the principal sum of two thousand dollars, on which said policy the plaintiff paid certain premiums and under which he received protection and which said policy was and has been by the defendants matured in favor of the beneficiary thereof and the proceeds thereof have been and are now being paid to and received by the beneficiary thereof; that by reason of the conversion of said War Risk Term Insurance contract to said Government live insurance policy a new contract was thereby made by the defendants and plaintiff and was entered into by the defendants and the said Orville Larsen,

which took the place of the said war risk term insurance contract and constituted a novation of and for the former contract of insurance between the defendants and the said Orville Larsen and that said term insurance contract thereby ceased to be in force and of effect.

Defendants further aver and allege that the said Orville Larsen was not entitled to have his said term insurance contract converted into a Government life insurance policy if he was at the time same was converted permanently and totally disabled and further alleges that to be entitled to convert said term insurance contract into a Government life insurance policy it was incumbent upon the said Orville Larsen to furnish proof satisfactory to the director of the United States Veterans' Bureau that he was not permanently and totally disabled and that the said Orville Larsen did furnish proof satisfactory to the director of the United States Veterans' Bureau that he was not permanently and totally disabled and his said contract of war risk term insurance was therefore and thereby converted into a said Government life insurance policy, and further, defendants aver and allege that by reason of the conversion of the said [28] term insurance contract to said Government life insurance policy, as aforesaid, the plaintiff, as executrix of the said Orville Larsen is barred and estopped from maintaining this action of said term insurance contract or from receiving any benefits thereunder.

VII.

Further answering plaintiff's complaint and by way of offset thereto in the event any judgment is obtained by the plaintiff in the above-entitled cause, defendants aver and allege that they have paid the said Orville Larsen and the plaintiff the sum of two thousand dollars and that defendants are entitled to have said amount set off against any judgment had by the plaintiff herein.

VIII.

Further answering plaintiff's complaint and by way of offset in the event plaintiff obtains any judgment in the above-entitled cause, defendants allege and aver that they paid the said Orville Larsen, during his lifetime, the sum of seven hundred seventy-two and 80/100 dollars which payment was erroneous and unlawful and the said Orville Larsen was not entitled thereto in law; that said sum was due the defendants from the said Orville Larsen during his lifetime and was never paid and is now due the defendants from the estate of the said Orville Larsen and that, therefore, the defendants are entitled to have said amount offset against any amount recovered by the plaintiff herein.

IX.

Further answering the plaintiff's complaint, the defendants allege and aver that they paid the said Orville Larson, during his lifetime, the sum of seven hundred seventy-two and 80/100 dollars, which was paid to said Orville Larsen erroneously and without authority of law and the said Orville

Larsen was not entitled thereto; that said sum was due defendants from the said Orville Larsen, during his lifetime, but that same was never paid and that said sum is now due the defendants from the plaintiff herein as executrix of said Orville Larsen and therefore defendants are entitled to a judgment [29] of and against the plaintiff herein for said amount.

WHEREFORE defendants pray that plaintiff's cause of action be dismissed and that they have judgment against the plaintiff for the sum seven hundred seventy-two and 80/100 dollars, and for costs.

JOHN B. WRIGHT,
United States Attorney.
By B. E. MARKS,
Asst. United States Attorney.

[Indorsements]: Service of copy acknowledged
12/3/28.

WM. R. MISBAUGH,
Of Counsel for Plaintiff.

Filed Dec. 5, 1928. [30]

[Title of Court and Cause.]

ORDER EXTENDING TERM SIXTY DAYS
TO SETTLE BILL OF EXCEPTIONS,
ETC.

The United States of America, defendant in the

above-entitled case desiring to have a bill of exceptions settled for the purpose of a writ of error.

Now, on motion of B. E. Marks, Assistant U. S. Attorney for the said United States of America, Defendant,

IT IS ORDERED, That the present term and the jurisdiction of the Court over the above-entitled cause, for the purpose of presenting and having settled a bill of exceptions, be and the same is hereby extended for a period of sixty days from the end of the present term; provided, however, that the proposed bill of exceptions shall be prepared and served by the party proposing the same upon the opposite party, and any proposed amendments and alterations thereof served by such opposite party, and the same submitted to the presiding Judge for settlement, within the times and in the manner provided by Rule 76 of the rules of this Court.

Dated at Tucson, Arizona, this 12th day of December, 1928.

JEREMIAH NETERER,
District Judge.

[Indorsement]: Filed Dec. 12, 1928. [31]

in the Veterans' Bureau shows chronic parenchymatous nephritis and was rated by the Bureau as temporary, total disability as of Nov. 3, 1919. April 30, 1920, diagnosis shows temperature 101, [33] extreme pain in right chest, "whole right chest is dull. X-ray of chest shows entire right lung cloudy." May 5, 1920, diagnosis temperature 101, extreme pain in right chest. Oct. 14, 1920, he was rated by the War Risk Insurance Division, "The degree of vocational handicap is major." Sept. 15, 1921, was rated as temporary, total disability from Jan. 8, 1921. April 4, 1922, reported by medical director of Olive View Sanatorium as not feasible for vocational training. July 24, 1922, report diagnosis tuberculosis, pulmonary, chronic—"apparently arrested." Aug. 12, 1922, diagnosis tuberculosis, pulmonary, chronic, not able to resume pre-war occupation. April 6, 1923, rated temporary, total from Aug. 12, 1922. Oct. 30, 1923, rated permanent and total from Aug. 31, 1923, and total, permanent, disability rating continued until his death.

5th. \$2,000 of the policy was reinstated on his application of Oct. 24, 1921, in which he stated, "I have continuously had a rating temporary, total disability since Nov. 3, 1919, and therefore a patient at the United States Hospital, No. 51, Tucson, Ariz." Jan. 24, 1922, he stated, "I have been advised to reinstate insurance in the amount of \$2,000 at this time. It is my intention to reinstate the policy of \$8,000 at a later date." Oct. 1, 1922, he applied for conversion of the \$2,000, reinstated, term policy into twenty payment life policy, and

premiums were paid until death. Upon death the amount of \$2,000 was paid to the beneficiary. Defendant paid the monthly installments accruing upon the converted insurance from Oct. 31, 1923, until January, 1927.

Larsen was unable to do any work, and the evidence is clear and convincing that his impairment was total at the date of his discharge and that it presented a condition of mind and/or body which rendered it reasonably certain that his disability would continue to be total throughout the remainder of his lifetime, and that his impairment rendered it impossible for him to engage in any employment that would bring him continuous, gainful results, something dependable for earning a livelihood.

From the facts stated the plaintiff is entitled to recover all of the due payments of the policy, and the other payments [34] in accordance with the provisions of the policy, that credit should be given to the defendant for the amounts paid either to the deceased in his lifetime or his representative since death. The surrender of the policy and changing the form of \$2,000 of the policy by reinstating and then converting it into a term policy does not estop the plaintiff in this action.

Wm. R. Misbaugh and F. W. Fickett, both of Tucson, Arizona, counsel for plaintiff.

John B. Wright, United States Attorney, Tucson, Arizona, and B. E. Marks, Assistant United States Attorney, Phoenix, Arizona, J. P. Grose, Regional Attorney, Veterans' Bureau, B. L. Guffy and L. B.

Dunn, Special Counsel for Veterans' Bureau, all of Phoenix, Arizona, counsel for defendant.

NETERER, District Judge.—There can be no doubt as to the fact that the deceased was totally and permanently disabled on the date of his discharge. This condition matured the policy, and he became entitled to the payment of \$240 monthly *in* installments of \$57.50 each from the date of discharge.

Is the plaintiff estopped by the assertion of the equitable defense by the application of the deceased for reinstatement of \$2,000 of the policy and conversion thereof into term insurance, surrendering the \$10,000 policy and receiving the reissued policy, and accepting monthly payments under the provisions of the new policy from the date disclosed in the record? Was the whole \$10,000 policy satisfied by the acceptance of the new \$2,000 policy? This burden is on the defendant to establish by a fair preponderance of the evidence, and this has not been done.

The condition of the deceased was known to the Veterans' Bureau. He was in United States hospitals. All medical diagnoses were in its possession, and all show the deceased's physical condition and that he was not fit for vocational training or for any service; and none show improvement except that of July 24, 1922, which says tuberculosis, pulmonary, chronic, "apparently arrested," but in less than three weeks thereafter deceased was rated *temporary total* disabled. The defendant upon the record must have known deceased's condi-

tion. The fact deceased did not know his condition and relied upon the Bureau in his application. [35] for reinstatement and conversion cannot change the plaintiff's status. The defendant on permanent, total disability was bound to pay by the terms of the policy, the legal obligation having matured. The liability became fixed in the full amount, and acceptance of a part of the due payment, even though it may have been through a reissued policy in lieu of the old, does not change the status nor bar plaintiff's claim to the balance. There was no benefit of right accruing to the plaintiff or damage to the defendant. *Brooks vs. White*, 2 Met. (Mass.) 283. The defendant lost nothing, *Struck vs. Slicer*, 97 S. E. 455 (Ga.); *Border & Co. vs. Vinegar Co.*, 62 S. 245 (Ala.); *La Moure vs. Cuyune-Mille Laes Iron Co.*, 180 N. W. 540 (Minn.); and the plaintiff gained nothing. (See, also, *United States vs. Skinner & Eddy Corp.*, 28 F. (2d) 373, 381.) The defendant paid only a part of what was due to plaintiff. The plaintiff did not know his legal status and right, and I think upon the record the court must find relied upon the Bureau. There is no suggestion in the record that deceased was consciously unfairly dealt with by the Bureau or overreached. On the contrary it shows that deceased was given much consideration. The Bureau has its problems and must administer its trust guardedly and conscientiously. It cannot nor may the Court distribute largess. The fact is, however, deceased had due \$10,000, and the defendant seeks to satisfy it by the payment of \$2,000, and in this the plaintiff would

be greatly wronged. This Court, in *United States vs. Skinner & Eddy*, supra, at 382, said: "Blackstone has said 'There is no wrong without a remedy.' Law or equity must remedy a wrong unfolded before it. Wrong, in truth, sometimes appears in the habiliments of right. The law blossoms upon the soil of wrong; but, if the law is barren, the virtue of equity must unfold into the fruitage of right. This asserted wrong may be within the garb of right, 'so stated in the bond,' but it does not disclose the true intent, and equity must unfold and fix the true status, and place the agreement within the intent and spirit of the parties. * * * * The Court should look beyond the strick letter of the correspondence to the intent, in view of the unconscionable result." In the instant case the law is potent. All payments that were made were due to Larsen or his legal representative, and defendant was [36] bound to make them. There was no consideration for the new policy. *Fire Ins. Co. vs. Wickham*, 141 U. S. 564.

The answer seeks enforcement of the reissued \$2,000 converted policy instead of the \$10,000, and to prevail the defendant must clearly show that the issuance is free from mistake or illegality, perfectly fair, equal and just, not only in its terms but in the circumstances, *Nevada Nickel Syndicate vs. National Nickel Co.* (C. C.) 96 F. 135, at page 145; and where it is "unconscientious or unreasonable," *Cathcart vs. Robinson*, 5 Pet. (30 U. S.) 264; or the disproportion so great as to shock the conscience, *Marks vs. Gates*, 154 F. 481; or where the

disparity is gross, equity will not enforce relief, Pasco F. L. Co. vs. Timmermann, 88 Wash. 112, 152 P. 675. All of the disclosed circumstances show that this claim, as said by the Supreme Court in Piatt's Admr. vs. United States, 89 U. S. (22 Wall.) 496, * * * * is utterly destitute of merit and repugnant to the plainest dictates of both law and justice."

Judgment will be awarded in favor of the plaintiff for the amount due on the policy less the payments which have been received, and the remainder to be paid in accordance with the provisions of the policy. The premiums paid by the deceased must be held to have been voluntary payments and may not be recovered.

JEREMIAH NETERER,
U. S. Dist. Judge.

[Indorsements]: Filed Dec. 14, 1928. [37]

In the District Court of the United States for the
District of Arizona.

November, 1928, Term—Tucson.

Honorable JEREMIAH NETERER, United States
District Judge, for the Western District of
Washington, Specially Assigned, Presiding.

(Minute Entry of Friday, December 14, 1928.)
L.-423.

FANNIE UNDERWOOD LAWSEN, Executrix
of the Estate of Orville Larsen, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MINUTES OF COURT—DECEMBER 14, 1928—
JUDGMENT.

The above-entitled cause came on to be heard before the above-entitled Court, sitting without a jury, on the 11th day of December, 1928, the plaintiff appearing by her attorneys, Fred W. Fickett and Wm. R. Misbaugh, and the defendant appearing by its attorneys, B. L. Guffy, B. A. Marks, J. P. Cross and L. B. Dunn. A written waiver of jury having been filed herein, by both parties, evidence, both oral and documentary, was introduced by both the plaintiff and the defendant, and upon

the close of the evidence the cause was submitted to the Court by the plaintiff without argument, and the cause having been argued by the defendant, and the Court, after considering the evidence and argument of counsel, and being fully advised in the premises, did find that the plaintiff was on April 5th, 1919, totally and permanently disabled and the term insurance policy issued to Orville Larsen matured and became payable to the said Orville Larsen from the defendant under the terms of said policy in the amount of fifty-seven and 50/100 dollars (\$57.50) per month from May 1st, 1919, down to December 11th, 1928, being a total sum of sixty-six hundred twelve and 50/100 dollars (\$6,612.50), against which sum the defendant was and is entitled to credit in the sum of two thousand seven hundred seventy-two and 80/100 (\$2,772.80) dollars, for payments made to Orville Larsen during his lifetime and to the plaintiff, and the Court did order that judgment be entered for the plaintiff in accordance with said findings. [38]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover of and from the defendant the sum of three thousand eight hundred fifty-nine and 70/100 dollars (\$3859.70), and that out of said sum the defendant shall pay to Fred W. Fickett and Wm. R. Misbaugh, attorneys for the plaintiff, the sum of three hundred eighty-five and 97/100 dollars (\$385.97) for their attorneys' fees in this action.

Done in open court this 14th day of December, 1928.

JEREMIAH NETERER,
Judge.

[Indorsements]: Filed Dec. 14, 1928. [39]

In the District Court of the United States for the
District of Arizona.

November, 1928, Term—Tucson.

(Minute Entry of Monday, February 18, 1929.)

The following order, heretofore made by the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, at Seattle, in the State of Washington, is now entered upon the minutes and records of this court, as follows, to wit:

L.-423.

FANNIE UNDERWOOD LARSEN, Executrix
of the Estate of Orville Larsen, Deceased,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MINUTES OF COURT—FEBRUARY 18, 1929—
FIRST AMENDED JUDGMENT.

The above-entitled cause came on to be heard before the above-entitled court, sitting without a jury,

on the 11th day of December, 1928, the plaintiff appearing by her attorneys, Fred W. Fickett and Wm. R. Misbaugh, and the defendant appearing by its attorneys, B. L. Guffy, B. E. Marks, J. P. Gross and L. B. Dunn. A written waiver of jury having been filed herein by both parties, evidence, both oral and documentary was introduced by both the plaintiff and the defendant, and upon the close of the evidence, the cause was submitted to the Court by the plaintiff without argument, and the cause having been argued by the defendant, and the Court, after considering the evidence and argument of counsel, and being fully advised in the premises, did find that the plaintiff was on April 5th, 1919, totally and permanently disabled and the term insurance policy issued to Orville Larsen matured and became payable to the said Orville Larsen from the defendant under the terms of said policy in the amount of fifty-seven and 50/100 dollars (\$57.50) per month from May 1st, 1919, down to March 29th, 1928, being a total sum of sixty-one hundred fifty-two and 50/100 dollars (\$6,152.50), against which sum the defendant was and is entitled to credit in the sum of two thousand eight hundred fourteen and 70/100 (\$2,814.70) dollars, for payments made to Orville Larsen during his lifetime and to the plaintiff, and the Court did order that judgment be entered [40] for the plaintiff in accordance with said findings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff do have and recover of and from the defendant the sum of three

thousand three hundred thirty-seven and 80/100 dollars (\$3,337.80), and that out of said sum the defendant shall pay to Fred W. Fickett and Wm. R. Misbaugh, attorneys for the plaintiff, the sum of three hundred thirty-three and 78/100 dollars (\$333.78) for their attorneys' fees in this action.

Done in open court this 14 day of February, 1929.
As of the 14th day of December, 1928.

JEREMIAH NETERER,
Judge.

[Indorsements]: Filed Feb. 18, 1929. [41]

[Title of Court and Cause.]

MOTION FOR A NEW TRIAL.

Comes now the defendants above named and moves the Court to set aside the judgment and decision of the Court in the above-entitled cause and to grant the defendants a new trial of said cause on the following grounds, to wit:

1. That the evidence is insufficient to justify the verdict and the judgment of the Court thereof.

2. That the decision and judgment of the Court is against the law and the evidence in the case.

WHEREFORE, defendants pray for an order in this behalf.

JOHN B. WRIGHT,
United States Attorney,
By B. E. MARKS,
Assistant United States Attorney.

[Indorsements]: Received copy of the within this 22 day of January, 1929.

FRED W. FICKETT,
WM. R. MISBAUGH,
Attorneys for Plaintiff.

Filed Jan. 22, 1929. [42]

[Title of Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL.

Motion for a new trial having been duly considered, it is ORDERED AND ADJUDGED that the same be and is hereby denied, to which ruling of the Court the defendant excepts, and the exception is noted.

JEREMIAH NETERER,
U. S. District Judge.

[Indorsements]: Filed Feb. 7, 1929. [43]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Judge and Clerk of the Above-entitled Court and to Attorneys for Plaintiff, Messrs. William R. Misbaugh and Fred W. Fickett:

You will hereby take notice that the defendants in the above-entitled cause hereby appeals to the United States Circuit Court of Appeals for the

Ninth Circuit on the form made and entered herein on the 23 day of April, A. D. 1929, as more fully appears in the assignment of errors and bill of exceptions herein filed.

JOHN C. GUNG'L,
United States Attorney,
By LEMUEL P. MATHEWS,
Assistant United States Attorney.

[Indorsements]: Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929. [44]

[Title of Court and Cause.]

PETITION FOR APPEAL TO UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

To the Honorable WILLIAM H. SAWTELLE,
Judge of the District Court of the United
States for the District of Arizona:

The above-named defendants through *its* attorney, Lemuel P. Mathews, Assistant United States Attorney for the District of Arizona, conceiving itself aggrieved by the judgment made and entered on the 14th day of December, A. D. 1928, and the order denying defendant's Motion for a New Trial made and entered on the 7th day of February, A. D. 1929, in the above-entitled cause, does hereby

appeal from the said judgment and order to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers from which said judgment and order was made, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN C. GUNG'L,

United States Attorney.

By LEMUEL P. MATHEWS,
Assistant United States Attorney.

[Indorsements]: Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929. [45]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, the defendants by Lemuel P. Mathews, Assistant United States Attorney for the District of Arizona, and makes the following assignment of errors, which it avers occurred at said hearing, and prays for a reversal of the judgment as prayed for in its Petition upon appeal:

“In that the Court erred in refusing to consider the plea of estoppel affirmatively set up in the pleadings.

II.

The Court erred in refusing to grant the motion of the defendant in the trial court for a directed verdict on the plea of estoppel based on the pleadings.

III.

The Court erred in permitting, over objection and exception, the introduction into evidence of certain examinations from the file by the plaintiff in the trial Court.

IV.

The Court erred in rendering judgment for the plaintiff in the trial Court as a matter of law by reason of estoppel introduced by the defendant in the trial court.

V.

The Court erred in refusing to grant the motion of the defendant in the trial Court for dismissal on the ground that the plaintiff did and could work subsequent to discharge from the service and therefore was not permanently and totally disabled.

VI.

The Court erred in refusing to grant the motion for a new trial of the defendant in the trial court.
[46]

VII.

The Court erred in finding as a conclusion of law that the plea of estoppel did not apply.

VIII.

The Court erred in finding as a fact that the plaintiff in the trial court was permanently and totally disabled at discharge in view of work record introduced by the defendant in the trial court.

IX.

The Court erred in refusing to find as a conclusion of law that the plaintiff was not permanently and totally disabled based on the evidence and the definition of permanent total disability.”

WHEREFORE, the defendants pray that the said judgment be reversed.

JOHN C. GUNG’L,
United States Attorney.
By LEMUEL P. MATHEWS,
Assistant United States Attorney.

[Indorsements]: Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929. [47]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

At chambers before the Honorable JEREMIAH NETERER, United States District Judge, the following proceedings were had:

In this cause on motion of counsel for the defendants, and it appearing to the Court that the above-

named defendants have heretofore filed its petition for an allowance of an appeal and concurrently therewith its assignment of errors;

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, directing from the judgment in this cause, made and entered on the 14th day of February, 1929, and the order denying defendants' motion for a new trial, made and entered on the 7th day of February, 1929, be and the same is hereby allowed to said defendants, and

IT IS FURTHER ORDERED, that the transcript of record, proceedings and all papers, will be transmitted by the Clerk of this court to the said United States Circuit Court of Appeals for the Ninth Circuit, be treated, considered and duly authenticated as a transcript of the record, proceedings and papers upon which this appeal is based and transmitted to said United States Circuit Court of Appeals for its consideration in connection with said appeal.

JEREMIAH NETERER,
United States District Judge.

Apr. 15, 1929.

[Indorsement]: Filed Apr. 23, 1929. [48]

[Title of Court and Cause.]

DECISION (ON MOTION TO STRIKE BILL
OF EXCEPTIONS).

Filed May 6, 1929.

WM. R. MISBAUGH, Attorney for Plaintiff.

JOHN B. WRIGHT, U. S. Attorney, LEMUEL P.
MATTHEWS, Asst. U. S. Attorney, Attorneys
for Defendant.

The plaintiff moves to strike the proposed bill of exceptions for failure to file within ten days after rendition of the decision, as provided by court rules, and for the further reason that the exceptions are wholly insufficient and merely proposed findings rather than protest against the ruling of the court.

At the conclusion of the trial, December 11, oral decision was announced by the Court, and formal written findings and decision were filed a day or two thereafter and a typed copy mailed to all parties to this action. On December 12, on motion of the defendant "desiring to have the bill of exceptions settled for the purpose of a writ of error," an order was entered extending the present term for the period of sixty days "for the purpose of presenting and having settled the bill of exceptions," "provided, however, that the proposed bill of exceptions shall be prepared and served by the party proposing the same upon the opposite party, and any proposed amendments and alterations

thereof served by said opposite party and the same presented to the presiding judge within the time and in the manner provided by Rule 76 of this court.”

Rule 76 provides that the “party desiring the bill shall within ten days after written notice of the rendition of the decision serve upon the adverse party a draft of the proposed bill of exceptions, accompanied by a concise statement of so much of the evidence as is necessary to [49] explain the exception and its relation to the case. Within ten days after service the adverse party may serve upon the proposing party proposed amendments, to be delivered thereafter within five days to the clerk for the judge; and the clerk, as soon as practicable, to deliver the proposed bill and the amendments to the judge, who shall designate a time at which he will settle the bill.”

The proposed bill of exceptions was served by the defendant on the attorneys for the plaintiff on the 11th day of April, 1929,—four months after rendition of the decision,—and filed with the Clerk of the court on the 23d day of April, 1929. The motion to strike was served on the 23d day of April, 1929, and filed on the same day in the Clerk’s office; and thereafter the proposed bill of exceptions and the motion were delivered to the Presiding Judge by mail.

Before the Court can allow or certify a bill of exceptions the party excepting must in a formal statement set forth exceptions taken at the trial to the decision, with so much of the testimony as

is necessary to enable the Appellate Court to say whether error was committed in respect to the particular decision. The purpose is to preserve and certify a report of the proceedings at the trial which do not otherwise appear upon the formal record of the proceedings, and so much of the evidence shall be embraced in the bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings, to which the exceptions are taken.

The evidence should be set forth in condensed and narrative form, unless for a proper understanding it should be set forth otherwise. The proposed bill is no bill of exceptions. It is merely a statement of conclusions: Paragraph 1, 2, 3, 4, and 5, do not comprehend or embody any finding or ruling of the Court. The formal findings of the Court are not set out or any exceptions thereto; and the reference to request for production of medical report referred to as "page 4 of the transcript," does not disclose [50] any objection, but merely an exception without any reason, and no statement of evidence leading to the request; and to the offer referred to as "page 18 of the transcript," of the medical examination of the deceased on his admission to the Government hospital November 3, 1919: "Guffy for the defendant, 'That is objected to for the reason stated to the other offer,'" no objection appears in the proposed bill. And "page 29 of the transcript of the evidence," to the question propounded to the doctor on the stand, there is no statement of evidence leading to the question, and the

objection that it does not contain all the facts that have been offered in evidence, in the absence, in the proposed bill, of the evidence as to the facts, amounts to nothing.

Motion to strike is granted.

NETERER,

United States District Court.

[Indorsements]: Filed May 6, 1929. [51]

[Title of Court and Cause.]

EXCEPTION TO DECISION ON MOTION TO
STRIKE BILL OF EXCEPTIONS.

Comes now the defendants and excepts to the decision of the Court striking the bill of exceptions heretofore filed, from the following grounds:

1. That this Court is without jurisdiction to strike the bill of exceptions.

2. That the order heretofore made by the Presiding Judge dated at Tucson the 12th day of December, 1928, a copy of said order hereto attached extends the time for the purpose of settling the bill of exceptions to sixty days from the end of the present term, which is May 1st, 1929.

JOHN C. GUNG'L,

United States Attorney.

LEMUEL P. MATHEWS.

By LEMUEL P. MATHEWS,

Asst. United States Attorney,

Attorney for Defendants.

[Indorsements]: Filed May 9, 1929. [52]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore allowed by said Court, and include in said transcript the following pleadings, proceedings and prayers on file to wit:

1. Complaint.
2. Summons.
3. Motion to strike.
4. Order allowing motion to strike.
5. Supplemental complaint.
6. Demurrer to answer.
7. Minute entry sustaining demurrer.
8. First amended answer.
9. Second amended answer.
10. Judgment.
11. Minute entries of judgment.
12. First amended judgment.
13. Motion for a new trial.
14. Order denying new trial.
15. Clerk's certificate.
16. Petition for appeal. [53]
17. *Petition for appeal.*
18. Assignment of errors.
19. Bill of exceptions.

20. Notice of appeal.
21. Order allowing appeal.
22. Citation.

Dated this the — day of April, 1929.

JOHN C. GUNG'L,

United States Attorney.

By LEMUEL P. MATHEWS,

Assistant United States Attorney.

Acceptance of service of the foregoing praecipe received this the — day of April, 1929.

[Indorsements]: Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,

Attorney for Plaintiff.

Filed Apr. 23, 1929. [54]

[Title of Court and Cause.]

SUPPLEMENTAL PRAECIPE FOR TRAN-
SCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare in addition to the records heretofore called for and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and include in said transcript the following pleadings, to wit:

1. Order extending the time to settle bill of exceptions.
2. Decision and finding of fact of the Trial Judge.

3. Decision of the Trial Judge on motion to strike bill of exceptions.
4. Exception to the decision on motion to strike bill of exceptions.
5. This supplement *le* praecipe.

The above request is based upon the records of this action, together with the decision of the Trial Judge striking defendant's bill of exceptions.

Dated this 7th day of May, 1929.

JOHN C. GUNG'L,

United States Attorney.

LEMUEL P. MATHEWS.

By LEMUEL P. MATHEWS,

Asst. United States Attorney.

State of Arizona,

County of Maricopa,—ss.

Lemuel P. Mathews being first duly sworn, on oath says that he is Assistant United States Attorney for the District of Arizona, and attorney for defendants in the above action on appeal; that he caused to be deposited in the United States post-office in Phoenix, Arizona, on May 7th, 1929, an envelope containing copies of the order of the Hon. [55] Jeremiah Neterer, extending the time to settle bill of exceptions and a copy of the decision and finding of fact of the Hon. Jeremiah Neterer, dated the 3d day of January, 1929. Said envelope containing said papers being properly addressed and mailed to Wm. R. Misbaugh, attorney for plaintiff, at Tucson, Arizona.

LEMUEL P. MATHEWS.

Subscribed and sworn to before me this 7 day of
May, 1929.

[Seal]

D. A. LITTLE,
Notary Public.

[Indorsement]: Filed May 9, 1929. [56]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States, for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files in the said court, including the records, papers and files in the case of Fannie Underwood Larsen, Executrix of the Estate of Orville Larsen, Deceased, Plaintiff, vs. United States of America, numbered L.-423—Tucson, on the docket of said court.

I further certify that the attached pages, numbered 1 to 57, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the praecipe filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the city of Tucson, State

and District aforesaid, except as follows: the fourth item in the original praecipe calls for "Order Allowing Motion to Strike." My record shows that the order which was made April 8, 1927, was one overruling the motion, which order is a part of this record. The seventh item under the original praecipe calls for "Minute Entry Sustaining Demurrer," whereas my record shows that plaintiff's demurrer to second amended answer was overruled September 17, 1928, which order is a part of this record. No bill of exceptions is included in the transcript for the reason that none has been allowed by the District Judge who tried the case.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$13.50 and that a constructive charge has been made against the United States for the same.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

WITNESS my hand and the seal of the said court this 13th day of May, 1929.

[Seal]

C. R. McFALL,
Clerk.

ARCHIE L. GEE.

By ARCHIE L. GEE,
Deputy Clerk. [57]

[Title of Court and Cause.]

CITATION.

By the Honorable WILLIAM H. SAWTELLE,
United States District Judge for the District
of Arizona in the Ninth Circuit to Fannie
Underwood Larsen, Executrix of the Estate of
Orville Larson, Deceased, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, in the District and Circuit above named on the 15 day of May, A. D. 1929, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Arizona, wherein the United States of America are appellants and you are appellee to show cause, if any there be, why the judgment and order entered in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the city of Tucson, State of Arizona, in the district and circuit above named, this the 15 day of April, in the year of our Lord one thousand nine hundred and twenty-nine and in the Independence of the United States the one hundred and fifty-third.

JEREMIAH NETERER,
United States District Judge.

Copy received this 11th day of April, 1929.

WM. R. MISBAUGH,
Attorney for Plaintiff.

Filed Apr. 23, 1929.

[Endorsed]: No. 5818. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Fannie Underwood Larsen, Executrix of the Estate of Orville Larsen, Deceased, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed May 15, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

